U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
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Issue Date: 08 March 2007

CASE NO.: 2005-LHC-616

OWCP NO.: 07-154938

IN THE MATTER OF:

B. M.[1]

Claimant

v.

SEA-LAND SERVICES, INC.

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Carrier

APPEARANCES:

LEONARD A. WASHOFSKY, ESQ.

For The Claimant

JOHN G. ALSOBROOK, ESQ. AND
GABRIEL THOMPSON, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

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[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Sea-Land Services, Inc. (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 24, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 11 exhibits, 9 of which were admitted into evidence, Employer/Carrier proffered 32 exhibits, 27 of which were admitted into evidence, and no joint exhibits were offered.[2] This decision is based upon a full consideration of the entire record.[3]

Post-hearing briefs were received from the Claimant and the Employer/Carrier by August 25, 2006. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. That the Claimant was injured on November 10, 1999. (Tr. 23).

2. That Claimant's injury occurred during the course and scope of his employment with Employer. (Tr. 23).

3. That there existed an employee-employer relationship at the time of the accident/injury. (Tr. 24).

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[2] Claimant's Exhibits CX-9 and CX-10, and Employer's Exhibits EX-23 through EX-27 were rejected.

[3] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; and Employer/Carrier's Exhibits: EX-___.

4. That the Employer was notified of the accident/injury on November 10, 1999. (Tr. 24).

5. That Employer/Carrier filed a Notice of Controversion for issues to be resolved in this proceeding. (Tr. 24-25).

6. That an informal conference before the District Director was held via correspondence. (Tr. 27).

7. That Claimant received temporary total disability benefits totaling $109,916.64 from November 10, 1999 through August 14, 2002, at a compensation rate of $763.31. Claimant also received permanent partial disability benefits totaling $111,486.13 from August 15, 2002 through May 31, 2006. Permanent partial disability benefits were paid at a compensation rate of $595.31 from August 15, 2002 through August 25, 2003; $563.31 from August 26, 2003 through August 25, 2004; and $549.97 from August 26, 2004 through May 31, 2006. (Tr. 21-22, 33-34; EX-31).

8. That Claimant's average weekly wage at the time of injury was $1,144.96. (Tr. 26).

9. That medical benefits for Claimant have been paid in the amount of $47,258.28 pursuant to Section 7 of the Act. (Tr. 21-22; EX-31, p. 1).

10. That Claimant reached maximum medical improvement on July 23, 2002.

11. The nature and extent of Claimant's disability is permanent and partial. (Tr. 28-29).

II. ISSUES

The unresolved issues presented by the parties are:

1. Claimant's physical work restrictions. (Tr. 29).

2. Wage earning capacity and compensation rate.

3. Whether forfeiture under Section 8(j) is applicable.

4. Whether Claimant failed to cooperate with vocational experts and whether sanctions apply.

5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was deposed by the parties on September 12, 2001 and September 30, 2004, and testified at formal hearing. (Tr. 156; EX-1, p. 1; EX-2, p. 1). He was forty-eight years old at the time of formal hearing. (Tr. 156). Claimant stated he has an eighth grade education, can read and write somewhat, but does not spell well. He testified he can only add with the aid of a calculator. (Tr. 159).

Claimant testified that he was employed by Employer as a power mechanic on November 11, 1999, when he sustained work-related injuries to his left shoulder, left arm and discs in his neck. (Tr. 156-157). Despite continued pain, he stated that he has indefinitely deferred recommended surgery because he was afraid of it. (EX-2, pp. 23-24).

He testified that after his compensable injury, he worked with Angela Harold, vocational counselor, concerning securing employment. He stated that he generally did what she asked of him. (Tr. 158). He did not tell her about his trucking business, BKM Enterprises, because she did not ask. (Tr. 212). She did not find him a job, but Claimant found a job at Jay's Auto Sales. (Tr. 158).

Claimant received weekly workman's compensation benefits of $763.31 from his injury through August 21, 2002, $595.31 through August 27, 2003, and $563.31 through the September 30, 2004 deposition. (EX-2, pp. 52-53).

Claimant began working at Jay's in August 2002, at a weekly salary of $252.00. (Tr. 161; EX-2, pp. 47-48). He testified that his duties included paperwork for auto rentals which he completed to the best of his ability. Jay's owner would correct any errors Claimant made on the paperwork. (Tr. 159). As part

of his employment arrangement, Claimant testified he was allowed to put a note on the door at Jay's and go home to rest when needed. (Tr. 160). Both Jay's and Bayou Boys Seafood are located in close proximity to Claimant's home. (Tr. 160-161).

Claimant stated his son took over Bayou Boys Seafood in August 2004. (Tr. 161). He is unsure if he began working for Bayou Boys about August 2004, or in January 2005 as stated on his Form LS-200, but stated he never did "double duty," meaning he was not getting money from both Bayou Boys and Jay's simultaneously. (Tr. 161-162, 206, 212). Therefore, he affirmed regardless of which is the correct date of employment with Bayou Boys, the dollar amounts reported on the LS-200 are correct. (Tr. 226).

Claimant testified he agreed to work at Bayou Boys for a flat weekly salary of $252.00, solely because that was the amount he earned at Jay's, and it was all he believed he was capable of earning. (Tr. 161-163, 201). Claimant stated that at both Jay's and Bayou Boys Seafood, he was free to go home and rest when he desires. (Tr. 166). He stated he chooses to remain employed at Bayou Boys because he can leave and go home without getting fired. (Tr. 184-185). Claimant further stated he has not received more than $252.00 per week from either Jay's or Bayou Boys, and has not worked anywhere else since his compensable injury. (Tr. 170).

Claimant works at Bayou Boys five days per week. (Tr. 166). He typically arrives about 10:00 a.m. and leaves about 2:00 p.m. He then returns immediately prior to closing. (Tr. 167). He stated he writes and signs all checks on the main business account at CPB [Central Progressive Bank], but does not calculate a balance. He testified that he reviews the bank statements, but does not know how to balance a checkbook, and has bounced checks as a result. (Tr. 174-175). He pays all employees including himself in cash, but does not take additional cash for his personal use. (Tr. 201, 207).

Claimant testified his duties at Bayou Boys include negotiating the price of seafood purchased from vendors, and sets selling prices. (Tr. 175, 218). He checks the quantity and unit price listed on the invoice. He testified that he cannot check the extended total by hand, but must use a calculator. (Tr. 175-176). He stated that he occasionally

represented himself as the owner of Bayou Boys, although it is actually owned by his son. (Tr. 172-173). He has lifted a fifty-pound box of shrimp, but normally uses a dolly to move things. (Tr. 169).

Claimant testified that prior to his son's purchase of Bayou Boys, he helped the prior owner, his cousin. His cousin added Claimant as a signer on the bank account, supplied Claimant with blank checks, and would occasionally request that Claimant pay a vendor. (Tr. 177, 210-211, 221). Claimant stated he was not paid for that work. (Tr. 178).

Claimant testified that he does not handle the personal bank account he maintains with his wife. (Tr. 173). He is aware that money belonging to his children has been deposited into the account and his wife has written checks against those funds. (Tr. 182). However, he does not know any of the details of the account, which is handled solely by his wife. (Tr. 183). He stated the only funds deposited which are attributable to him are social security benefits, worker's compensation benefits, and some earnings from Bayou Boys. (Tr. 183).

Claimant testified at his September 2001 deposition that he was diagnosed with diabetes in 1995, and treated with pills. (EX-1, p. 18). He testified at formal hearing that he currently holds a chauffeur's license, but does not hold a commercial driver's license. (Tr. 179). Claimant stated he could not drive a transportation vehicle for a living because he tends to fall asleep when driving for a long period of time due to his diabetes. (Tr. 180-181). Claimant stated he also believes his neck and shoulder would hurt if he drove for an extended period. (Tr. 181). Riding or driving for 34 miles to his attorney's office does not bother him. (Tr. 217). He acknowledged that he rides his motorcycle on occasion for short distances, but states that the bike does not vibrate or jerk. (Tr. 219).

Claimant testified that he formerly had a sole proprietorship named "BKM Enterprises (BKM)," which began prior to his compensable injury. (Tr. 170; EX-1, p. 8). He owned two 18-wheeler trucks which he had leased to companies. (Tr. 170). BKM got a percentage of the proceeds from each load from which expenses such as fuel and insurance were paid. (Tr. 186). BKM had gross revenues in 1999, 2000, 2001, and 2002 of $8,048, $38,390, $54,251, and $52,366 respectively. (Tr. 187, 190, 192). Claimant further testified that he never made any money with the trucking business. (Tr. 172).

At his deposition in 2001, when asked if he had "any other kind of money coming into the home," Claimant responded that he had a trucking business that lost money. He stated he had purchased an 18-wheeler on September 12, 1999, and leased it to a company. (EX-1, p. 7). However, the truck had broken down about a week prior to the deposition and was out of service. (EX-1, p. 8). At his 2004 deposition, Claimant was asked if he still had a trucking business. He responded that it was no longer in operation. He stated he now owned two trucks, a Volvo and a National, both of which were out of service and sitting in his yard. (EX-2, p. 36). He stated he had put ads in the paper to try to sell both trucks. (EX-2, p. 36). Claimant testified at formal hearing that the trucks were still inoperable. (Tr. 172).

Claimant acknowledged that he received Forms LS-200 from Employer's representative. (Tr. 192-193). Claimant stated he signed the forms on March 23, 2005, and would have received them shortly before. (Tr. 224). Claimant acknowledged that he failed to include activity from "BKM Enterprises" on the LS-200 although he reported the activity on his income tax returns and showed a profit from the business in 2001. (Tr. 194, 196-197). He stated that he did not know he had to list the trucking enterprise on the form. (Tr. 232).

Claimant's Spouse

Claimant's wife testified at formal hearing that she and Claimant have been married for 23 years and have four children, two boys and two girls. (Tr. 74, 84).

She testified that the checking account she maintains with her husband received deposits of earnings of her oldest daughter and both of her sons. (Tr. 76-79). Her daughter was divorced and moved "back home." (Tr. 90). Claimant's wife stated that she deposited her daughter's cash or paycheck into the account, and then paid bills for her daughter as requested. (Tr. 76-77, 90).

Claimant's wife stated their oldest son had not maintained a checking account. (Tr. 90). From approximately 2000 through 2004, son's paychecks were sent to her home. She deposited the paychecks into the checking account, and paid her son's bills and withdrew cash for him out of the account. (Tr. 78, 91). His paychecks varied from over $1,000.00 to approximately $450.00 depending upon the hours worked. (Tr. 106). Her youngest son also did not maintain a checking account, and she

performed similar services for him using the same checking account. (Tr. 78-79). Claimant's wife stated she did not keep an accounting of activity transacted for her children. (Tr. 106-108).

Claimant's wife stated that she, Claimant, and their children under 18 years old received social security benefits as a result of Claimant's disability. (Tr 88). Claimant and their youngest daughter presently receive social security benefits. (Tr. 88). In 2002, a back payment of social security benefits of approximately $26,000.00 was received into Claimant's bank account. (Tr. 88-89).

Claimant's wife testified that their youngest son acquired Bayou Boys Seafood from his cousin in August 2004, but does not work at the business. (Tr. 77-78, 82-83). Rather, Bayou Boys is operated by Claimant and his wife, and employs one person as a seafood boiler and one part-time employee. (Tr. 83).

Claimant's wife stated she works the front part of the store, and does not receive pay from the business. (Tr. 79, 84). She testified that Claimant does not have specified hours and does not work a full eight hours per day. (Tr. 81, 93). Typically, Claimant goes to Bayou Boys every morning that the business is open. (Tr. 93). When he is in pain, he goes home, rests, and uses a heating pad. (Tr. 82).

Claimant's wife testified Jay's Auto Sales is located about two blocks from Bayou Boys. (Tr. 81-82). Claimant also did not have specified hours at Jay's. (Tr. 93). When Claimant felt bad, Claimant would put a sign on the door and go home to rest until he received a call. (Tr. 94).

Claimant's wife stated Claimant received compensation of $252.00 per week from Bayou Boys, which has remained the same since he began working there. (Tr. 82). She stated that Claimant did not receive pay from Bayou Boys and Jay's at the same time. (Tr. 100). She testified that Claimant was not a paid employee of Bayou Boys until January 2005, but helped with the business prior to that time. (Tr. 100, 103). Both she and her husband have represented themselves as owners of the business, but neither have an ownership interest. (Tr. 104-105).

Claimant's wife testified that surgery on Claimant's neck or cervical spine had been recommended, but Claimant elected not to have the surgery because the doctor told them additional surgery would be necessary as Claimant got older if he had the initial operation too soon. (Tr. 85).

Claimant's wife testified that she and Claimant owned an 18-wheeler truck which was leased to a company, but she was not directly involved in the business. (Tr. 86, 95). Claimant never drove the truck nor performed mechanical work on it. (Tr. 87). She testified that Claimant hired a driver, and the company to whom the truck was leased set up loads. (Tr. 95). She stated she did not believe the business was ever profitable, but acknowledged that tax returns showed a profit of $3,877.00 in 2001, and $3,160.00 in 2003. (Tr. 96-97, 98). Their tax return reflected losses by the business in 1999, 2000, and 2002. (Tr. 113, 115, 117). The business ended when the truck broke, and it is presently not operable. (Tr. 86-87).

Claimant did not work between his compensable injury and his work at Jay's Auto. (Tr. 86). Claimant has not received income from any other business venture, and his only sources of income from gainful employment were Jay's Auto and Bayou Boys Seafood. (Tr. 88).

Claimant's wife acknowledged that she and her husband have occasionally traveled to casinos on the Mississippi gulf coast for shows. (Tr. 108-109). She stated that they also traveled to Las Vegas for a vacation with other family members. (Tr. 110). While there, they attended an expensive show by Celine Dion. (Tr. 110). She also acknowledged that Claimant owns a motorcycle which he rides occasionally. (Tr. 112).

Claimant's Youngest Son

Claimant's youngest son testified at formal hearing that he is twenty-one years old and works at Academy Sports & Outdoor. (Tr. 119). He also owns Bayou Boys Seafood, which he purchased from his cousin in August 2004 for $5,000.00. (Tr. 120). He stated his father manages the business, which employs two other persons beside his father. (Tr. 121). He visits the business only occasionally (Tr. 125). He owns the business license under which the business operates. (Tr. 125-126). He stated that both he and Claimant are authorized signers on the business checking account, but Claimant signs all checks for the business. (Tr. 126-127).

Claimant's youngest son testified that Claimant receives only $252.00 per week. (Tr. 127, 138). When asked why Claimant is paid that amount, he stated "he's on a disability thing and that's all the money that he's supposed to get." (Tr. 127). Claimant's youngest son further testified that he could not pay his father more even if he felt he deserved more. (Tr. 138). He further stated Claimant was "hired on" in August 2004, but he did not know whether Claimant actually collected a weekly salary from August 2004 to the present. (Tr. 140-141, 153).

He further testified that the employee who does the boiling of seafood is paid $7.00 per hour. (Tr. 127-128). He is not sure how many hours per week that employee works. (Tr. 128). The part-time employee is paid $5.50 per hour. (Tr. 130). He stated that his mother works at the business, and his sister helps occasionally, but neither are paid. (Tr. 129-130).

Claimant's youngest son testified he was aware that Claimant worked at Jay's Auto but does not know what his job entailed. (Tr. 143-144). He acknowledged that his deposition testimony indicated that he was unaware that his father worked at Jay's. (Tr. 144-145).

Claimant's Oldest Son

Claimant's oldest son was twenty-five years old when he was deposed by the parties on February 22, 2006. (CX-11, pp. 1, 6). He lived with his parents prior to March 2004 when he began living with his wife. (CX-11, pp. 7-8, 10). He has an eleventh grade education, but did not graduate or receive a GED. (CX-11, p. 9).

Claimant's oldest son stated he began working for Atlanta Sounding as a deckhand in April 1999, and became a licensed tugboat captain in 2003. (CX-11, pp. 10-11, 15). Except for a two-month absence in 2000, he worked for the same employer from 1999 until 2005. (CX-11, pp. 17, 83). In 2005, he began working through a union. (CX-11, p. 83).

Claimant's oldest son testified that his weekly pay varied depending upon the number of days worked. His scheduled called for work shifts of fourteen days, followed by seven days off. (CX-11, pp. 12-14). In 2002, his paychecks varied in three-week cycles and were approximately $600-$700, $1,200-$1,400, and $450, for pay periods in which he worked four, seven, and three days respectively. (CX-11, pp. 20-21).

Claimant's son testified that prior to October or November 2004, his paychecks were mailed to his mother's address. (CX-11, p. 22). He stated that since he did not have a bank account, his mother would deposit his paychecks, pay his bills, and give him the remainder. (CX-11, pp. 23-24, 29). His mother maintained a record of his balance on a calendar. (CX-11, p. 53). He did not pay rent to his parents. (CX-11, p. 25).

He further testified that about November 2004, Claimant's oldest son opened a bank account with his wife and began depositing his checks into his own account. (CX-11, p. 63). He verified that his 2004 W-2 form reflects income of $44,921.00. (CX-11, p. 63).

Raymond Viale

Mr. Viale is a tax preparer, and testified at formal hearing. (Tr. 299). He testified that he personally prepared Claimant's [income] tax return for 2000, and others in his office prepared Claimant's 2001 through 2003 returns. Mr. Viale stated he informed Claimant that he was not required to file an income tax return for 2004 because his earnings were below the filing requirement of approximately $19,000.00. (Tr. 299, 303).

Ronald Frazier

Mr. Frazier is an investigator and testified at formal hearing. He and others in his firm conducted surveillance of Claimant beginning September 1, 2004. (Tr. 317).

Mr. Frazier testified that on September 1, 2004, he went to Jay's Auto in Pearl River, Louisiana. (Tr. 318-320). Finding several cars in the lot, but no sales person, he proceeded to Bayou Boys Seafood where he encountered Claimant who introduced himself as the owner of Bayou Boys. (Tr. 318-319).

Mr. Frazier testified he recorded the video tape on September 2, 2004, which was viewed at formal hearing. In the video, Claimant was observed at Jay's Auto charging a car battery. Mr. Frazier stated that Claimant's actions indicated that he was still employed at Jay's. (Tr. 325-326). On September 3, 2004, Claimant was observed at Bayou Boys Seafood in the morning and at Jay's Auto later in the day. (Tr. 329).

Mr. Frazier further testified that Claimant was surveilled on September 6, 2004 through September 8, 2004, and on September 21, 23 and 30. (Tr. 333, 341). He stated that video was taken of work activity performed by Claimant, including the following: at 10:39 a.m. on September 21, in which Claimant was filmed at Bayou Boys carrying an ice chest to a vehicle and putting it into the back, (Tr. 334-335); Claimant was further observed opening a storage unit in the back of Bayou Boys at 12:07 p.m. and dragging out a blue ice chest, (Tr. 336); Claimant then is observed with two ice chests on a four-wheel dolly, (Tr. 337); at approximately 12:17 p.m. Claimant and another person weighed seafood, (Tr. 337-338); an exchange of money was also observed. (Tr. 340).

Mr. Frazier stated that over the course of his investigation in September 2004, he observed Claimant at Bayou Boys Seafood on a daily basis. (Tr. 359). He observed Claimant less frequently at Jay's Auto. (Tr. 359).

Mr. Frazier testified that he resumed surveillance of Claimant on December 7, 2004. (Tr. 342). On that date, he purchased shrimp from Claimant at Bayou Boys. (Tr. 346). He wrote a check for the purchase which was subsequently deposited into Central Progressive Bank. (Tr. 346). He stated that Claimant's telephone number was posted at Jay's Auto the same day. (Tr. 344). Mr. Frazier concluded that Claimant was also running Jay's Auto. (Tr. 343).

Mr. Frazier stated upon investigation, he found that the occupational license for Bayou Boys Seafood was held by Claimant's cousin. (Tr. 344). He observed photos on the wall inside Bayou Boys dated 2002 and 2002, which featured Claimant posing with a girls' softball or soccer team that was sponsored by Bayou Boys. (Tr. 347-348). Mr. Frazier testified that he also secured a copy of a form from the St. Tammany Parish Health Department relative to Bayou Boys Seafood that was signed by Claimant on December 13, 2004. (Tr. 349-350). Claimant's name was printed on the form in the space marked "name of responsible agent." (Tr. 352).

Mr. Frazier testified that additional surveillance was initiated on December 21, 2005. (Tr. 353, 355). On that date, Claimant was filmed unloading cases of soft drinks and hams or turkeys. (Tr. 354). Mr. Frazier stated he observed Claimant moving one case of drinks at a time. He also observed Claimant moving two turkeys or hams at a time, which Mr. Frazier opined

weighed up to fifteen pounds each. (Tr. 374). Mr. Frazier testified that did not see Claimant lift anything that he knew to exceed fifty pounds. (Tr. 372).

Mr. Frazier stated he also observed cars parked in a vacant field next to Bayou Boys Seafood with "for sale" signs containing Claimant's phone number. (Tr. 360). Upon investigation, he identified multiple vehicles registered to Claimant, but did not know if any of them belonged to his children. (Tr. 382).

Mr. Frazier stated he lives in the area and has occasion to drive on the highway in front of Bayou Boys several times per day. (Tr. 363). After Hurricane Katrina, he stated he observed Claimant digging a hole with a post-hole digger, and working with "the heavyset bald-headed man" on the sign, carrying bushel baskets of crawfish, and helping people load and unload their cars. (Tr. 360). Additionally, he observed Claimant working at Bayou Boys in May or June 2004. (Tr. 361).

The Medical Evidence

In addition to the following, multiple medical records concerning Claimant's injury are included in the record and have been reviewed.

An August 30, 2001 Functional Capacity Evaluation reports work limitations in the "light to medium" physical demand level, which limits lifting to 35 pounds occasionally, 15 pounds frequently, and 5 pounds constantly. The report also notes Claimant should not climb while carrying things. (EX-3, pp. 39-43).

On September 11, 2001, Dr. Bartholomew noted that he agreed with the FCE findings of work limitations in the light to medium physical demand category. (EX-3, p. 38).

On October 2, 2001, Dr. Gregory Dowd noted the results of an MRI performed on March 9, 2001, which showed C3-4 and C4-5 disc/osteophyte complex protrusion. He further noted that an EMG performed on February 15, 2001, showed "middle trunk or C7 nerve root" lesion, and left carpal tunnel syndrome. (EX-3, p. 14). With respect to work restrictions, Dr. Gregory Dowd opined "I agree that the patient is in a light to medium duty

classification with lifting limit of approximately 25 lbs. and no working above his head . . . I do feel that the patient can return to work without surgery at a light duty capacity as outlined in the FCE." (EX-3, p. 15).

On March 2, 2005, Dr. James Butler of Tulane University Medical Group, Department of Orthopedic Surgery, rendered a report on his evaluation of Claimant at the request of Crawford & Company. He agreed with prior treatment, agreed that Claimant is a candidate for fusion surgery, and concluded that Claimant's hand numbness is the result of an elbow condition, which is unrelated to Claimant's disc problems. Dr. Butler also noted Claimant's pain fluctuates with his activity level. (EX-12, pp. 2-4).

The Vocational Evidence

Angela Harold

Ms. Harold testified at formal hearing and is a vocational counselor with Crawford & Co., the third party administrator of Claimant's claim. (Tr. 45). She was assigned the case on November 26, 2001. (Tr. 46-47). She rendered various reports regarding Claimant, the most recent being a vocational rehabilitation report dated January 23, 2006. (EX-6, pp. 1-3).

Ms. Harold interviewed Claimant on December 17, 2001, and began rehabilitation efforts. (Tr. 48). She discussed with Claimant his medical status, familial, educational, and vocational history. (Tr. 276). She also performed academic tests. (Tr. 276). Claimant scored on the sixth grade level in reading comprehension, fourth grade level in letter/word recognition and math, and eighth grade level in word problems. (Tr. 277).

Ms. Harold testified that Claimant did not mention BKM Enterprises, his trucking venture, in discussions with her. (Tr. 279). Had she known of the business, Ms. Harold stated she would have explored the subject with Claimant further. Such experience may indicate that Claimant possesses additional communication skills. (Tr. 279). Ms. Harold further testified that she did not ask Claimant specifically about the business, although she did inquire about his work history and skills. (Tr. 280).

Ms. Harold testified that she worked with Claimant for approximately two years from 2001 until 2003. (Tr. 48). During that time, Ms. Harold researched GED requirements and VETA, a program that promotes adult literacy. (Tr. 291). She stated that Claimant took a placement test for the GED program, but was disappointed in his scores and intimidated by the classroom setting. Consequently, he did not follow through with taking the GED test. (Tr. 291-292). Ms. Harold testified that she did not recommend vocational retraining other than the GED and VETA programs. (Tr. 292).

Ms. Harold stated Claimant cooperated with her with regard to communication, but failed to follow up on other jobs identified. Claimant found the job at Jay's Auto through his own efforts. (Tr. 49). Prior to his interview with Jay's, Ms. Harold reviewed interview skills with Claimant and conducted mock interviews. (Tr. 285). After Claimant secured the job at Jay's, Ms. Harold continued placement efforts at the request of the adjuster. (Tr. 49).

Shortly after Claimant secured the job at Jay's, Ms. Harold identified a job of service advisor at a car dealership, with an estimated annual pay of $25,000.00. (Tr. 52; EX-6, pp.4-5). Job duties included working with customers, looking up parts, ringing up customer purchases, and documenting customers' vehicle problems. Physical requirements include occasional lifting and carrying of up to ten pounds, and a high school diploma or GED certificate was preferred but not required. (EX-6, p. 88).

She also identified a job as dispatcher at Standard Materials which was available in June 2003, with a wage rate of $300.00 per week. (Tr. 53-54). Training was provided for the dispatcher position, and no minimum education or license was required. (Tr. 55). The job was located in Pearl River, Louisiana, and it afforded a lunch period and breaks during an eight-hour shift. (Tr. 56). Duties included taking calls, dispatch of drivers to location, and completion of paperwork and logistical logs and reports. (EX-6, p. 30).

Ms. Harold stated she informed Claimant of the dispatcher job, however, he chose to remain employed at Jay's and did not apply for the job. (Tr. 56, 288-289). Ms. Harold continued to survey the labor market for jobs in Claimant's geographic area until the fall of 2003. (Tr. 57). She stated her purpose was to locate full-time or higher paying employment for Claimant. (Tr. 287).

Ms. Harold testified Claimant's file was reopened in March 2005. (Tr. 59). She was directed by the adjuster to look for restaurant management jobs in Claimant's geographic region. (Tr. 61). She continued efforts until the hurricane (August 29, 2005), but did not find any jobs in that category for which Claimant qualified because those positions required a GED or high school certificate. (Tr. 62).

Ms. Harold testified that she contacted Claimant's attorney on January 13, 2006, to request another interview with Claimant. She was informed that Claimant was working at Bayou Boys and she was denied an interview with Claimant. (Tr. 63-65). On January 23, 2006, she rendered a vocational rehabilitation report which stated that medical restrictions of Dr. Butler and the FCE were utilized. (Tr. 66; EX-6, p. 1). Jobs were identified as being within a 30 or 60 mile radius from Claimant's home. (Tr. 284). Specific physical requirements of individual jobs were not listed in the report. (EX-6, pp. 1-3).

Ms. Harold testified that the following jobs were listed as available in her January 2006 report. An entry level manager trainee position at Raising Cane's was available with a wage rate of $10.00 to $12.00 per hour. (Tr. 66, 283). Several positions as unarmed security guards at various rates of pay were also available at wages ranging from $7.00 to $10.00 per hour. A position in part sales at Pep Boys offered $8.00 per hour. Another position available was a food preparation worker at McAllister's in Covington, Louisiana. (Tr. 283). An assistant management position was available at Piccadilly which involved supervising restaurant operations. Some positions within thirty miles of Claimant's home paid $10.00 per hour, and a position in Boutte, Louisiana paid $11.25 per hour. (Tr. 283-274). A similar position as assistant manager was available at Sal's Restaurant. (Tr. 283). An assistant manager position at Subway paid $8.00 to $12.00 per hour. (Tr. 284).

Ms. Harold stated that post-Katrina wages have substantially increased due to displaced workers. (Tr. 296). She opined that, depending upon the specific job, a job paying $6.00 or $7.00 per hour pre-Katrina, may make $9.00 to $10.00 per hour post-Katrina. (Tr. 296). She further stated that the wage rates of all of the jobs she identified in January 2006 were higher than the wages would have been in 1999. She agreed that all jobs identified in January 2006 would have probably had a wage rate not exceeding $7.00 per hour in November 1999. (Tr. 297).

Nancy Favaloro

Ms. Favaloro is a vocational rehabilitation counselor and testified at formal hearing. (Tr. 235). She conducted a vocational evaluation of Claimant at Employer/Carrier's request, and prepared a labor market survey in July 2004. (Tr. 235).

She interviewed Claimant at his attorney's office on April 24, 2004. (Tr. 235-236; EX-7, p. 1). She reviewed Claimant's work history and educational background, and administered some vocational tests. (Tr. 237-238). She noted that Claimant had about a seventh grade education. (Tr. 237). Claimant scored at a third and fourth grade level on reading and word identification tests. (Tr. 239). Ms. Favaloro stated Claimant conveyed to her that in filling out paperwork at Jay's, he looked at drivers' licenses and copied information to other forms. (Tr. 258). Claimant scored at the 6.4 grade level for word problems read to him. She stated that the results seemed inconsistent with some of Claimant's prior job duties and present work at the seafood market. (Tr. 239).

Ms. Favaloro testified that Claimant related his job history, which included work as a container mechanic, other mechanic work, and truck driver. (Tr. 237-238). She testified that Claimant did not mention BKM Enterprises, his trucking enterprise to her. (Tr. 238, 245). She agreed that she was not restricted in the questions she was allowed to ask Claimant. (Tr. 252). Ms. Favaloro stated she probably did not ask Claimant directly if he owned any businesses, but would expect to be told about such in response to her questions about his employment. (Tr. 253-254).

Ms. Favaloro stated that based on the testimony she heard at formal hearing, skills apparently utilized by Claimant in BKM Enterprises would have been useful in a transferable skills analysis. (Tr. 245-247). Additionally, skills utilized in the trucking enterprise and seafood business are inconsistent with Claimant's 2.7 grade level for reading. (Tr. 247). Ms. Favaloro stated that she did not know about Claimant's job at Bayou Boys Seafood at the time she compiled her report as he did not secure that job until after she met with him. (Tr. 248). She stated that the additional information may have added to the job inventory. (Tr. 249-250, 256). However, she does not know what specific jobs may have been added. (Tr. 256).

Ms. Favaloro's report noted work restrictions as listed in the FCE were lifting thirty-five pounds occasionally, fifteen pounds frequently, and five pounds continuously. Claimant was determined to be capable of continuous sitting, standing, and walking, but no carrying of things up and down ladders. (Tr. 237). She noted that Claimant conveyed his restrictions as no lifting of twenty-five pounds for more than two hours, no overhead work, or climbing of ladders. (Tr. 236).

The following positions were listed by Ms. Favaloro in her labor market survey conducted in July 2004. (Tr. 240).

The position of production assistant at Multi-Tech required the worker to sit or stand, do very basic reading, and lift about twenty pounds. Training was provided. The worker's function was to clean and reassemble copier and printer cartridges, and the wage rate was $7.00 per hour. (Tr. 240). The worker can sit or stand while working, and the upper extremities are used. (EX-7, p. 6).

A position of cashier at North Park Car Wash was listed. The worker accepts payments and service tickets from customers/staff and uses a simple cash register. (Tr. 240; EX-7, p. 7). Basic reading was required as well as counting money. (EX-7, p. 7). The wage rate was $6.50 to $7.00 per hour. (Tr. 241).

The position of unarmed security guard with Vinson Guard Service was identified. Basic reading was required to fill out reports. (Tr. 241). Ms. Favaloro stated that if the worker cannot write legibly, a supervisor would write for them. Physical requirements include some standing, walking, and sitting depending upon the assignment. Ms. Favaloro stated that all postural demands are allowed by Claimant's FCE. The wage rate is $6.50 to $7.00 per hour. (Tr. 241).

The position of orthodontic lab technician trainee was also identified. The worker uses small tools to make braces and corrective wear. Lifting is no more than ten pounds, and the worker will stand and walk for about thirty percent of the work day. The remainder of the day would be spent sitting and using the hands. The wage rate is $7.00 per hour. (Tr. 241).

A full time position of shuttle bus driver for Casino Magic was identified. (Tr. 241-242, 265). The worker is required to hold a CDL (commercial driver's license), with a passenger endorsement. (Tr. 242). Ms. Favaloro testified that in order

to secure a passenger endorsement, the Department of Motor Vehicles requires the candidate to take a test, but not the physical component of the test that would be required to drive 18-wheelers. (Tr. 243). The test can be taken verbally if the candidate is unable to take a written test. (Tr. 264). Duties consist of driving patrons between the casino and hotels. (Tr. 244). The wage rate was $7.00 to $8.00 per hour at the time of the labor market survey. (Tr. 244). Occasional lifting of up to thirty-five pounds is required, and more frequent lifting of no more than twenty-five pounds. (EX-7, p. 7).

This job would have become unavailable in August 2005, as Casino Magic has not reopened following Hurricane Katrina. (Tr. 267). Ms. Favaloro stated that a similar position became available post-Katrina at the Treasure Chest Casino in Kenner, Louisiana, with a pay rate of $9.00 per hour. Ms. Favaloro testified that she does not know the distance from Claimant's home in Pearl River, Louisiana, to the Treasure Chest Casino. (Tr. 267-269).

Ms. Favaloro testified that at the time she rendered the report, she provided the job listings to Drs. Butler, Bartholomew, and Dowd, Claimant's treating and consulting physicians. (Tr. 244). Dr. Dowd did not reply, but Drs. Butler and Bartholomew approved the jobs. (Tr. 244-245). She stated she also provided the job list to Claimant's counsel on September 21, 2004. (Tr. 245).

Other Evidence

Six Forms LS-200 for annual periods beginning November 10, 1999 through "present day 2005" were submitted into evidence. Claimant signed all of the Forms LS-200 on March 23, 2005. No income from BKM Enterprises is listed for any year. Claimant reported earnings on the Forms LS-200 as follows: (1) from Jay's Auto from January 11, 2004 through January 7, 2005 of $2,016.00; (2) from Bayou Boys Seafood from January 11, 2005 through March 18, 2005 of $2,520.00; (3) from November 11, 2003 through November 10, 2004 from Jay's Auto of $10,080.00; (4) from November 11, 2002 through November 10, 2003 from Jay's Auto of $9,576.00; and (5) from August 23, 2002 through November 10, 2002 from Jay's Auto of $2,016.00. Claimant reported no earnings from the date of his accident through August 23, 2002. (EX-5, pp. 1-6).

Income tax returns of Claimant's oldest son were reviewed. His 2002 return reported adjusted gross income of $34,125.00 and a refund of $2,247.00. (CX-8, pp. 2-3). A corresponding deposit for the amount of $2,247.00 was received into Claimant's personal bank account on February 7, 2003. (EX-8, p. 124). Claimant's oldest son's return for 2003 reported adjusted gross income of $42,700.00 and a refund of $3,634.00. (CX-8, pp. 5-6).

Bank statements on Claimant's personal bank account at Hibernia were reviewed. Several ACH (automated clearing house) deposits were present including income tax refunds and social security payments. (EX-8). Total deposits, excluding credit for returned items, for the twelve statement periods immediately preceding and including December of each year are $56,221.93 for 2000, $61,407.32 for 2001, $95,801.26 for 2002, $115,080.27 for 2003, and $103,421.19 for 2004. Total deposits for the four months ending in April 2005 were $18,601.73. (EX-8). Notably, in August 2002, transfers of $22,444.50 and $3,481.50 were received from social security. (EX-8, p. 112).

Claimant's income tax returns for tax years 1999 through 2003, and Bayou Boys bank account records from Central Progressive Bank and Hibernia were reviewed. (EX-9; EX-10; EX-20). Form 1040 Schedule C shows Claimant's net business income/loss as a loss of $8,824.00 in 1999, loss of $4,812.00 in 2000, profit of $3,877.00 in 2001, loss of $3,358.00 in 2002, and profit of $3,160.00 in 2003. (EX-10, pp. 4, 16, 34, 44).

Surveillance video taken in September 2004 on the 2nd, 8th, 9th, 21st, 23rd, and 30th was viewed. Claimant was observed at both Jay's Auto and Bayou Boys Seafood on several occasions during this period. On September 21, 2004, Claimant was observed carrying an ice chest to the trunk of a car. The ice chest appeared to be empty as Claimant carried it by one handle as it hung perpendicular to the ground. On the same day, Claimant was observed pulling an ice chest filled with shrimp from a freezer onto a hand truck (dolly). Claimant was observed a few moments later pouring shrimp out of the ice chest with the aid of two other men. (EX-28).

Also viewed was surveillance video taken on December 21, 2005, and in January 2006 on the 6th, 11th, and 12th. Claimant was observed at Bayou Boys Seafood on December 21, 2005, moving cases of soft drinks, one at a time, from the bed of a pickup truck onto a dolly. He was also observed carrying hams or turkeys, two at a time, from the pickup truck into the Bayou

Boys Seafood building. On January 11, 2006, Claimant appeared to move a bag of trash inside the Bayou Boys' building. (EX-29).

The Contentions of the Parties

Claimant contends that he is presently employed in appropriate suitable alternative employment and consequently his compensation rate should be $563.31 per week based upon his conceded wage earning capacity of $300.00 per week. He concedes making mistakes on Forms LS-200, but contends that they were unintentional, and resulted from his inability and lack of education. Therefore, he contends, he is not subject to forfeiture under Section 8(j) of the Act. Claimant further contends that he did cooperate with vocational experts and the fact that they were not informed about his trucking business, BKM Enterprises, was because they did not ask appropriate questions.

Employer/Carrier contend that Claimant is underemployed and capable of earnings as shown in the labor market surveys or greater. Jobs listed in the labor market survey may be incomplete because Claimant failed to cooperate with vocational experts. They further contend that Claimant held simultaneous employment at Jay's Auto and Bayou Boys Seafood and earnings from such were not reported on Form LS-200, nor were earnings from Claimant's trucking business, BKM Enterprises. Employer/Carrier contend that misrepresentations on Forms LS-200 were willful and intentional, and therefore forfeiture of benefits under Section 8(j) of the Act is appropriate. Employer/Carrier also request termination or suspension of benefits, or other appropriate sanctions, based upon their contention that Claimant failed to cooperate with their vocational experts.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative

Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

The parties stipulated that Claimant sustained a work related injury and is unable to return to his usual employment.

B. Nature and Extent of Disability

The parties also stipulated that the injury is permanent in nature, Claimant having reached maximum medical improvement on July 23, 2002, and partial in extent as he is capable of some alternative employment.

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978). The claimant's obligation to seek work does not displace the employer's **initial** burden of demonstrating job availability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Board has held that a claimant "must, if possible considering his medical condition, reasonably cooperate with employer's rehabilitation specialist." The Board considered it

an improper legal standard to discredit the findings of a rehabilitation specialist without considering a claimant's lack of cooperation. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985).

In the instant case, Employer/Carrier contend that Claimant failed to cooperate with vocational counselors in that (1) he failed to inform either Ms. Harold or Ms. Favaloro about BKM Enterprises, and (2) Ms. Harold was denied a second interview of Claimant after her request to Claimant's counsel on January 13, 2006. Both Ms. Harold and Ms. Favaloro testified that knowledge of Claimant's activities concerning BKM would have prompted additional inquiry and may have impacted their labor market surveys. However, both have also testified that they did not question Claimant directly concerning his interest or involvement in a business.

Ms. Harold, a vocational counselor for Crawford & Company who administered the claim, testified that she was assigned the case on November 26, 2001. She initially interviewed Claimant on December 17, 2001 and performed academic tests. She testified that Claimant refused to apply for the two jobs she found after he began employment at Jay's Auto. Ms. Favaloro testified that she interviewed Claimant on April 24, 2004, and prepared a labor market survey at Employer/Carrier's request.

Claimant was deposed by the parties on September 12, 2001 and September 30, 2004. At both depositions, Claimant discussed BKM Enterprises. No evidence was introduced to suggest that Claimant acquired additional skills or training between 2001 and formal hearing, nor was it contended that Claimant's physical condition changed. Therefore, information regarding BKM Enterprises was manifest to Employer/Carrier during the time of all labor market surveys.

Based on the foregoing, I find and conclude that Employer/Carrier have failed to establish Claimant's failure to cooperate with either vocational expert. Accordingly, his alleged failure to cooperate will not be considered in this analysis of suitable alternative employment.

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and

that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

In cases of permanent partial disability classified under Section 908 (c)(21), a claimant's compensation is based on two-thirds of the difference between the claimant's average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21). The Act mandates that a claimant's loss in wage-earning capacity may be determined by his actual earnings **only** if such actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable. 33 U.S.C § 908(h).

Claimant testified that he does not work a full 40 hours per week. He concedes a wage earning capacity of $300.00 per week, which represents full-time work at a wage rate of $7.50 per hour. He further contends that the correct rate of compensation is $563.31 ($1,144.96 [stipulated AWW] - $300.00 = $844.96 x 2/3 = $563.31) commencing when Employer began payment at that rate on August 26, 2003.

As there is no medical evidence restricting Claimant to part-time work, I find that Claimant's present job does not fairly and reasonably represent his wage-earning capacity. Therefore, Claimant's reasonable wage-earning capacity must be determined.

The Board has mandated that the wages earned in a post-injury job must be adjusted to the wages that job paid at the time of claimant's injury. This insures that wage-earning capacity is considered on an equal footing with the determination of average weekly wage at the time of the injury. Richardson v. General Dynamics, 19 BRBS 48 (1986). In cases where the actual wages paid by a post-injury job at the time of injury are unknown, the Board has mandated that the wages of the post-injury job be adjusted according to the national average weekly wage (NAWW) statistic published by the U. S. Department of Labor. Richardson v. General Dynamics, 23 BRBS 327 (1990).

Claimant was injured in 1999. Labor market surveys were conducted between 2001 and the formal hearing in 2006. Therefore, under Richardson, supra, the wages of any job found to be suitable alternative employment must be adjusted to the wage paid by that job on the date of Claimant's injury.

Claimant's work restrictions

Claimant's work restrictions were outlined in a FCE dated August 30, 2001. On September 11, 2001, Dr. Bartholomew noted his agreement with the FCE findings, and on October 2, 2001, Dr. Dowd also agreed, but changed the maximum weight lifting limit to 25 pounds. Drs. Bartholomew and Dowd were treating physicians.

Based on the foregoing, I find that Claimant's physical work restrictions for purposes of suitable alternative employment are as follows: physical demand level of "light to medium" with weight lifting limits of 15 pounds frequently, and 5 pounds constantly, as noted in the FCE, and a maximum weight lifting limit of 25 pounds as imposed by Dr. Dowd; no overhead work; and no carrying of things while climbing.

Both vocational counselors performed academic tests of Claimant. His scores on reading comprehension ranged from a third to sixth grade level. Additionally, Claimant testified that he filled out paperwork at Jay's Auto by means of copying information from drivers' licenses. As both vocational experts have performed academic testing of Claimant and concluded his educational level to be below a high school level, this limitation must also be taken into consideration.

Jobs Identified and Analysis

Ms. Harold, a vocational expert, testified that she originally worked on Claimant's case for approximately two years between 2001 and 2003. During that time, she identified two jobs, one as service advisor at a car dealership, available in August 2002, with an estimated annual pay of $25,000.00; the second as dispatcher, identified in June 2003, with a weekly wage rate of $300.00 per week.

As the beginning wage rate of the dispatcher job is at or below Claimant's conceded wage earning capacity, discussion of the job is moot.

Assuming, **arguendo**, that the wage rate for this position was higher, job duties call for filling out paperwork and reports, which may be beyond Claimant's academic ability. It is highly questionable as to whether or not this position is one for which Claimant could compete with a realistic expectation of securing employment. As insufficient information is included in the record for a determination, I find that this job does not constitute suitable alternative employment.

Likewise, the duties of the service advisor job include documentation of customers' vehicle problems. This job requirement would appear to be beyond Claimant's academic capabilities in light of the tests performed by the vocational experts. The position did not require a high school education but preferred a diploma or GED. As insufficient information is included in the record for a determination of whether Claimant is academically capable of performing the job duties required, I find that this job does not constitute suitable alternative employment.

In January 2006, Ms. Harold identified several available positions of: manager trainee, unarmed security guard, parts sales person, food preparation worker, and assistant management positions at restaurants. Starting wage rates for these positions ranged from $7.00 to $11.25 per hour. Ms. Harold testified that in her opinion the wage rates of all of the jobs identified in January 2006 would have probably had a wage rate not exceeding $7.00 per hour in November 1999, the date of injury. As explained above, the operative wage rate of post-injury jobs is the wage rate which those jobs would have paid at the date of injury. Since the 1999 wage rate for all of the jobs listed by Ms. Harold in January 2006 is below Claimant's conceded wage earning capacity, analysis of those positions is also rendered moot.

Ms. Favaloro, a vocational expert, identified several full-time jobs in her labor market survey conducted in July 2004. She identified a position of production assistant at a wage rate of $7.00 per hour, a position of cashier at a car wash with a wage rate of $6.50 to $7.00 per hour, a position of unarmed security guard at a wage rate of $6.50 to $7.00 per hour, a position of orthodontic lab technician trainee with a wage rate of $7.00 per hour, and a position of shuttle bus driver for Casino Magic at a wage rate was $7.00 to $8.00 per hour. As the

wage rate for all of these positions is below the $7.50 per hour ($300.00 per week) wage earning capacity that was already conceded by Claimant, determination of whether or not these jobs constitute suitable alternative employment for Claimant is unnecessary.

Assuming, **arguendo**, that the job of shuttle bus driver paid wages above the conceded amount, I will compare the job requirements to Claimant's restrictions. Among the physical requirements were occasional lifting of up to 35 pounds, and more frequent lifting of up to 25 pounds. These weight limits exceed the 25-pound maximum imposed by Dr. Dowd and the 15-pound limit for frequent lifting as outlined in the FCE. Accordingly, I find that this job does not constitute suitable alternative employment for Claimant.

At formal hearing, Ms. Favaloro identified an available position of shuttle bus driver at the Treasure Chest Casino in Kenner, Louisiana, with a pay rate of $9.00 per hour. Specific job requirements were not identified, therefore an actual comparative analysis is not possible. Assuming, **arguendo**, that the job requirements for this position are comparable to the requirements for the position at Casino Magic as outlined above, this job would exceed Claimant's physical restrictions for reasons outlined above.

Additionally, this job is located slightly less than 50 miles from Claimant's residence, which is at the outer fringe of the distance Claimant can be expected to travel for work[4]. Finally, the 2006 wage rate of $9.00 per hour, when adjusted toa 1999 wage rate using the formula outlined in Richardson, supra, yields a wage rate of $291.15[5], which is below Claimant's

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[4] Mapquest query states distance of 48.60 miles based on shortest time, and 48.19 miles based on shortest distance. (*Driving Directions from 38169 Hudson St., Pearl River, LA to 5050 Williams Blvd, Kenner, LA*, Mapquest,www.mapquest.com/directions/main.adp, March 6, 2007).

[5] Wage rate of $9.00 x 40 hours = $360.00 weekly x 19.12% [percentage change in NAWW from November 10, 1999, date of injury to May 24, 2006, date of formal hearing] = $68.85 adjustment. $360.00 - $68.85 = $291.15 adjusted equivalent 1999 wage rate. Percentage change in NAWW = $536.82 NAWW at May 2006 - $450.64 NAWW at November 1999 = $86.18 change in NAWW divided by $450.64 = 19.12% change in NAWW.

conceded wage earning capacity. Accordingly, I find that this position does not constitute suitable alternative employment for Claimant.

Conclusion

Based on the foregoing, I find and conclude Employer/Carrier have not demonstrated suitable alternative employment with an adjusted pay rate under Richardson, supra, that meets or exceeds the wage earning capacity of $300.00 weekly as contended by Claimant. Accordingly, I find Claimant is entitled to temporary total disability benefits from November 10, 1999 to July 23, 2002 based on his average weekly wage of $1,144.96, permanent total disability from July 24, 2002 to August 14, 2002 based on his average weekly wage of $1,144.96, permanent partial disability from August 15, 2002 to August 25, 2006 based on two-thirds of the difference between his average weekly wage of $1,144.96 and his wage earning capacity of $252.00, and permanent partial disability from August 26, 2002 to present and continuing, based on two-thirds of the difference between his average weekly wage of $1,144.96 and his wage earning capacity of $300.00.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

Since Claimant has established a compensable injury, Employer/Carrier remain responsible for future medical care and treatment pursuant to Section 7 of the Act.

V. FORFEITURE UNDER SECTION 8(j)

Section 8(j) of the Act provides:

> (1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who--
>
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
>
> (B) **knowingly and willfully** omits or understates any part of such earnings, and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.
>
> (3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

33 U.S.C § 910(j).

The implementing regulations for Section 8(j) are 20 C.F.R. §§ 702.285 and 702.286, which provide in pertinent part:

> (a) The report shall be made on a form prescribed by the Director and shall include all earnings from employment and self-employment and the periods for which the earnings apply. The employee must return the complete report on earnings even where he or she has no earnings to report.
>
> (b) For these purposes the term "earnings" is defined as all monies received from any employment and includes . . . all revenue received from self-employment even if the business or enterprise operated at a loss of (sic) if the profits were reinvested.

20 C.F.R. 702.285.

> . . . (b) Any employer or carrier who believes that a violation of paragraph (a) of this section has occurred may file a charge with the district director. The allegation shall be accompanied by . . . any other evidence showing earnings not reported or underreported for the period in question. Where the district director finds the evidence sufficient to support the charge he or she shall convene an informal conference as described in subpart C and shall issue a compensation order affirming or denying the charge and setting forth the amount of compensation for the specified period. If there is a conflict over any issue relating to this matter any party may request a formal hearing before an Administrative Law Judge as described in subpart C.

20 C.F.R. 702.286

Employer/Carrier contend that Claimant's benefits should be reduced and/or forfeited under Section 8(j) because he willfully and knowingly under-reported income on Forms LS-200 from 1999 through 2005. In support of this allegation, they advance three theories.

First, Employer/Carrier contend that Claimant willfully and knowingly failed to report income from his trucking business, BKM Enterprises, on Form LS-200 from 1999 through 2004. Secondly, Employer/Carrier contend that Claimant worked for Jay's Auto and Bayou Boys Seafood simultaneously for the period of approximately August 2004 through December 2004. Thirdly, they contend that Claimant has and is presently earning more income than he is reporting. In support of this contention,

they attempt to show that (1) more money was deposited into Claimant's personal bank account than is supported by his reported household income, and (2) that Claimant is living above his means. These theories will be addressed in turn.

Prefatorily, it is noted that the Board has ruled that notwithstanding the plain language of 20 C.F.R. 702.286, that an administrative law judge has the authority to adjudicate a forfeiture charge. Floyd v. Penn Terminals, Inc., 37 BRBS 141 (2003), citing Moore v. Harborside Refrigerated, Inc., 28 BRBS 177 (1994). The Board further held that "based on a consideration of the relevant statute and its implementing regulations, that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the administrative law judge. Moore, supra.

BKM Enterprises

Claimant concedes his failure to list gross receipts of BKM Enterprises on Forms LS-200 submitted to Employer/Carrier, and that such income should properly have been included. However, Claimant contends that this oversight was the result of his lack of understanding, and was not a knowing and willful omission.

BKM Enterprises lost money in 1999, 2000, and 2002. It made a profit in 2001 and 2003. The cumulative business loss over the five years was approximately $9,957.00. Claimant signed all Forms LS-200 on March 23, 2005. In his depositions in September 2001, when asked about "any other" income, Claimant responded that he had the trucking business and it was losing money. Again, at his deposition in 2004, when asked specifically about the business, Claimant stated that he now owned two trucks, both of which were out of commission. The enterprise was not operated thereafter.

An essential element of forfeiture of benefits under Section 8(j) is Claimant's intent to deceive an employer. In the instant case, I find that element is missing. Claimant revealed the existence of BKM Enterprises in years prior to his completion of the Forms LS-200. Further, he revealed in broad terms, that the business had lost money, which is correct both in the years in which he was deposed and in the aggregate. Accordingly, I find that Claimant did not willingly and knowing omit income from Forms LS-200, and therefore is not subject to forfeiture under Section 8(j) based on the omission.

Did Claimant work for Jay's Auto and Bayou Boys Seafood simultaneously?

As noted earlier, the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. 5 U.S.C. Section 556(d). Here, Employer/Carrier contend that Claimant under-reported income on Forms LS-200 in that he was working for Jay's Auto and Bayou Boys Seafood in late 2004, but did not report income from both companies concurrently.

Both Claimant and his wife have credibly testified that Claimant performed some services at Bayou Boys Seafood prior to purchase of the business by his son. Claimant has stated that he is not sure of the actual date he became a compensated employee of Bayou Boys. Claimant believed the date to be August 2004 while his wife testified that he began receiving compensation from Bayou Boys in January 2005 but helped at the business prior to that time. Claimant was observed at both locations during September 2004, and performed work at Bayou Boys prior to January 2005. Both Claimant and his wife have testified that Claimant did not receive pay from both employers simultaneously, and he did not have specified hours at either.

Claimant's performance of uncompensated work at Bayou Boys is not relevant to a forfeiture determination. The operative inquiry is whether or not sufficient evidence has been introduced to establish unreported income. I find and conclude that Employer/Carrier have not established that Claimant received compensation concurrently from Jay's Auto and Bayou Boys Seafood, and therefore has not established that Claimant knowingly and willingly omitted income from Forms LS-200. I further find that Claimant is not subject to Section 8(j) forfeiture on this basis.

Does the evidence support a finding that Claimant received more income than he reported based on banking records?

Employer/Carrier contend that Claimant is receiving and spending more money than is supported by his reported sources of income and compensation. Therefore, they conclude that he has in fact earned more income than he reported on Forms LS-200. The inquiry regarding Claimant's bank deposits is separate and distinct from the inquiry regarding Claimant's spending habits. Therefore, each is addressed below in turn.

Claimant's bank deposits

In Cheetham vs. Bath Iron Works, 38 BRBS 80 (2004), the Board observed "Section 8(j) of the Act is intended to operate as an informal tool for monitoring a disabled employee's earnings from employment or self-employment." Therefore, the purpose of the provision concerns Claimant's income, not overall assets or lifestyle.

The implementing federal regulations allow Employer/Carrier to introduce proof by "any other evidence showing earnings not reported or under-reported for the period in question." 20 C.F.R. 702.286(b). Therefore, any evidence which leads necessarily to a conclusion that Claimant has unreported income may be used to support a finding of under-reported or unreported income, and concomitant consequences under Section 8(j).

Employer/Carrier contend that more deposits are being received into Claimant's bank account than are supported by his reported income, social security, and worker's compensation benefits. If such a contention is supported by sufficient evidence, the burden shifts to the Claimant to offer explanation as to an alternative source of the incoming funds. Unexplained incoming funds may be used to support a finding of under-reported or unreported income.

Employer/Carrier have introduced bank statements that show Claimant's bank account receiving deposits in excess of the total of Claimant's declared household income, social security, and compensation. Claimant counters by testimony that monies belonging to several of Claimant's children were funneled through the account, although Claimant's wife did not keep an accounting and was not sure of the amount. The testimony is further supported by other evidence including Claimant's son's income tax records which show a refund which corresponds to a direct deposit into Claimant's bank account. Taking into account the additional funds from Claimant's children, Claimant's bank deposits, which exceeded $100,000.00 in 2003 and 2004, do not reflect an amount in excess of Claimant's reasonable explanation.

Thus, I find and conclude that Employer/Carrier have failed to carry their burden of establishing that Claimant knowingly and willingly under-reported or failed to report income on the basis of bank deposits. Accordingly, I find that Claimant is not subject to Section 8(j) forfeiture on this basis.

Claimant's Spending Patterns

Unlike evidence of unexplained incoming funds, evidence of specific expenses or spending patterns cannot directly lead to any conclusion concerning income. Conversely, such evidence leads to a further inquiry as to the source of funds used to support such spending.

Employer/Carrier contend that Claimant's spending records support a conclusion that his income is greater than reported. They make much of a vacation to Las Vegas, taken by Claimant and others, in which he attended a show by Celine Dion costing approximately $800.00 per person.

Economic theory holds that conclusions may be drawn based on spending patterns of individuals, households, and populations. Indeed, such theory is commonly held valid. However, such macro-analysis is not necessary in this case. The instant case involves only one Claimant. The proper inquiry and analysis need not extend beyond his specific financial records. As stated, conclusions based upon specific expenses or spending patterns are not sufficient to support a contention that unreported income exists to support that spending. Consequently, I find that Employer/Carrier have failed to carry their burden of establishing that Claimant knowingly and willingly under-reported or failed to report income on the basis of spending by Claimant. Accordingly, I find that Claimant is not subject to Section 8(j) forfeiture on this basis.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982).

This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[6] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

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[6] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **December 21, 2004**, the date this matter was referred from the District Director.

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from November 10, 1999 to July 23, 2002, based on Claimant's average weekly wage of $1,144.96, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from July 24, 2002 to August 14, 2002, based on Claimant's average weekly wage of $1,144.96, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from August 15, 2002 to August 25, 2006, based on two-thirds of the difference between Claimant's average weekly wage of $1,144.96 and his reduced weekly earning capacity of $252.00, and permanent partial disability from August 26, 2002 and continuing, based on two-thirds of the difference between Claimant's average weekly wage of $1,144.96 and his reduced weekly earning capacity of $300.00 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's November 10, 1999, work injury, pursuant to the provisions of Section 7 of the Act.

5. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 8th day of March, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge